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# **National Counter-terrorism (CT) policies and challenges to human rights and civil liberties: case study of the UK**

## **Developing a multi-faceted preventive counter-terror response in the UK**

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### **Abstract**

In the UK the rise post-2005 in ‘home-grown’ terrorism, relying to a significant extent on strikes on soft targets by ‘self-starters’, means that the search for effective preventive measures remains a continuing concern. Below a number of the preventive counter-terror measures adopted post 9/11, and incrementally strengthened in response to the current threat, are found to fall into three categories and represent interventions at the stages in the path towards attacks. This chapter focuses on selected examples of these preventive measures. In terms of three key stages, firstly, there is the attempt to prevent radicalisation, under the ‘Prevent’ strategy. A second strategy relies on taking certain measures to control the activities of those considered likely – on the balance of probabilities – to engage in terrorist-related activity. A third preventive strategy relies on the special terrorism offences under the Terrorism Acts 2000 and 2006, as amended, intended to allow for intervention at a very early stage in terrorist plots and in preparing or instigating terrorist acts (‘precursor’ offences).

**Key words:** counter-terrorism, Prevent strategy, control orders/TPIMs, Human Rights Act, ‘precursor’ offences

### **1. Introduction**

The recently increased threat posed by terrorism to Western democracies comes largely from

changing and evolving Islamic terrorist groups, but increasingly in 2017-18 it has also come from far-right groups (Anderson 2015, paras 2.4-2.9; Anderson 2017, para 1.4; Europol 2018, chapter 3; Home Office 2018d, para 1.4). For example, the Assistant Commissioner of the Metropolitan Police, Mark Rowley, has stated that four extreme-right terror plots were disrupted in the first half of 2017 (Grierson 2018); furthermore, as at March 31 2018, thirteen percent of terrorist offences related to individuals with far-right ideologies, and the proportion of individuals adhering to far-right ideologies was recorded to have almost doubled since 2015 (Home Office 2018a, para 5.2). In 2016 the extreme right-wing terrorist group National Action was proscribed. In 2017 their aliases Scottish Dawn and the National Socialist Anti-Capitalist Action group were also banned. The Home Secretary addressed the issue of right-wing extremism on 5 June 2018, stating that: ‘Extreme right-wing terrorism is also an increasing threat. This was tragically demonstrated by the Finsbury Park attack (19<sup>th</sup> June 2017) and by the shocking murder of MP Jo Cox (16<sup>th</sup> June 2016)’; he went on to note that by December 2017 seven extreme right-wing plots had been foiled since the Westminster attack in March 2017 (Home Office 2018b; Anderson 2017).

As regards Islamist terrorism, as David Anderson, the previous independent reviewer of terrorist legislation, has put it: ‘[it] is now practised by a diverse range of groups, many of which have no current connection with al-Qaida and some of which are actively opposed to it’ (2015, para 1.13). For some time terrorist activity has been manifesting itself mainly in the form of so-called ‘home-grown’ terrorism, but finding inspiration, or direction and funding from external forces. That was the case as regards the attacks in January 2015 on Charlie Hebdo, the Paris attacks in November 2015 and the July 2016 Normandy Church and Nice truck attacks, which were organised and perpetrated largely by ISIS-supporters, some of whom had fought with ISIS, and almost all of whom were French nationals (Farmer 2016). Similarly, the Brussels terrorist strike on 22 March 2016, the deadliest act of terrorism in Belgium's history, was perpetrated by at least 3 Belgian nationals (BBC News 2016). In the UK the threat currently comes in part from nationals who have travelled abroad to fight or train with ISIS, and then returned to the UK, as evidenced by the fact that of around 900 persons who had travelled to Syria and Iraq, 40% have returned (Home Office 2018, chapter 1). However, the fact of leaving to support ISIS is far from the only indicator that an ISIS-supporter poses a risk; for example, a report by Hegghammer and Nesser (2015) found that more attacks in the West had been mounted by such sympathisers than by returnees from fighting with ISIS in Syria or Iraq, but that ‘the organisation’s formidable resources and verbal hints at future attacks [by

returnees] give reason for vigilance’.

The threat level in the UK is currently set at ‘severe’ in 2018, the second highest level possible; it was raised to ‘severe’ in August 2014 from ‘substantial’ – the level it had been at for most of the period 2006-2011. While the precise nature of the terrorist threat has changed over the seventeen years since 9/11, and is not associated only with Islamic terrorist groups, it clearly increased after the international Coalition, including the UK, agreed to airstrikes against ISIS in 2014 (Home Department 2015). Given the diminution of ISIS-held territory after 2015, the group called on its followers to remain in their home countries in order to mount attacks. Over the past 5 years, the law enforcement and intelligence agencies have foiled as many as 25 Islamist-linked plots in the UK (Intelligence and Security Committee 2017, paras 22-23). The former Independent Terrorism reviewer, David Anderson QC, described the evolution of the threat posed by ISIS in 2015:

The volume and accessibility of extremist propaganda – some of it in the form of slickly-produced films – has increased. UK-based extremists are able to talk directly to ISIL fighters and their wives in web forums and on social media. The key risk is that this propaganda is able to inspire individuals to undertake attacks without ever travelling to Syria or Iraq. Through these media outputs, ISIL has inspired the increase in unsophisticated but potentially deadly attack methodologies which have been seen recently in Australia, France, Canada, Denmark and the USA (2015, para 2.11).

The military destruction of ISIS, virtually completed in 2018, may also have led to an increase in the number of returnees who have experienced weapons and explosives training (‘foreign terrorist fighters’; Powell 2016).

In 2017 a number of attacks were perpetrated by English citizens, including the 22 March Westminster Bridge attack, which caused the deaths of 5 people, the Manchester Arena bombing on 22 May which resulted in 22 deaths, the London Bridge attack on 3 June, killing eight people and the 19 June Finsbury Park Mosque attack (London) resulting in one death (Anderson 2017). In response to these attacks, the UK threat level was raised twice to critical, the highest level. At present, in 2018, the UK threat level remains at ‘severe’ and the greatest threat continues to be from Islamist terrorism, including Al Qa’ida supporters, but particularly from ISIS/Daesh. For example, the security and intelligence agencies in 2018 handled over 500 live operations, and had 3,000 ‘subjects of interest’; a further 20,000 people were investigated and understood to possibly pose a threat (Home Office 2018, para 60). The Home Secretary

stated in June 2018: ‘While the so-called caliphate is a thing of the past, Daesh continues to plan and inspire attacks both here and abroad as well as recruiting British citizens to fight’ (Javid 2018). Further, more than 80 of the 193 terms issued for terrorism offences between 2007 and 2016 will run out by the end of 2018, so a number of persons who are already radicalized, and are likely to be embittered to a greater extent than previously, will be released (Grierson and Barr 2018).

The rise post-2005 in ‘home-grown’ terrorism, relying more on strikes on soft targets, such as pedestrians, by ‘self-starters’, rather than on larger operations, as in the Paris attacks, means that the search for effective preventive measures to use against nationals remains a continuing concern (Home Office 2018, paras 53-66; Pantucci et al 2015; Home Affairs Committee 2014; Home Office 2013, 8; 2014, 15; Sagemaan 2008; Beutel 2007). The threat has also arisen from citizens in neighbouring democracies, such as Salah Abdeslam, a Belgian, who is suspected of involvement in the November 2015 Paris attacks (BBC News 2018). In contrast, the threat from foreign nationals has decreased due to the ‘sustained and determined’ use of deportation (Anderson 2012, p4). Anderson pointed out: ‘At the start of the control order regime in 2005, all controlled persons were foreign nationals. By the end in 2011, all were British citizens’. (It may be noted that detention or stringent bail conditions can be imposed if deportation can be seen as imminent since the exception under Article 5(1)(f) ECHR is viewed as applicable: *R (on the application of Hardial Singh) v Governor of Durham Prison* [1984] WLR 704.)

A number of the counter-terror measures adopted post 9/11, and incrementally strengthened in response to the current threat, can be said to fall into three categories, and are aimed at addressing the *prevention* of terrorist attacks rather than responding to them – they are proactive rather than reactive. They represent intervention at the stages in the path towards such attacks. This chapter will focus on selected examples of these three forms of preventive measures.

In terms of the three, which to an extent correspond to the stages leading up to an attack, firstly, there is the attempt to prevent radicalisation occurring, under the ‘Prevent’ strategy. Prevent was strengthened in 2015 when aspects of the strategy were placed on a statutory basis under Part 5 Counter-terrorism and Security Act 2015 (CTSA). Part 5 marks a new emphasis in counter-terrorist law and policy, a move from focusing mainly on early-stage terrorist activity, to creating additional sanctions aimed at manifestations of extremism. The aim underlying Part

Part 5 section 26, intended to curb extremism, is to disrupt pathways into terrorism via radicalization. It represents an attempt to allow intervention in a process of radicalization which might eventually lead to engagement in terrorist-related activity. Part 5 contrasts with a second strategy – to take certain measures to control the activities via Terrorism Prevention and Investigation Measures (TPIMs) of persons considered likely, on the balance of probabilities, to engage in terrorist-related activity. Part 5 section 26 is aimed at seeking to prevent persons from ever engaging in such activity (Walker and Rehman 2012, 257-60). These measures may be termed liberty-invading non-trial-based executive measures (hereafter ‘executive measures’), and at the present time they take the form of TPIMs, which replaced control orders. The Prevent strategy also strongly contrasts with the aims behind the special terrorism offences under the Terrorism Acts 2000 and 2006, as amended, although they are also preventive in nature. A number of the offences are aimed at allowing intervention at a very early stage in terrorist plots and in preparing or instigating terrorist acts (‘precursor’ offences) – the third preventive strategy. The contrast between reliance on the precursor offences and the deployment of TPIMs is clearly less strong since their aims are similar, and in some instances it appears that an offence could have been charged instead of imposing a TPIM (see eg *E v SSHD* [2008] 1 AC 499 [75]; Walker 2009; see also p 00 below). The imposition of a TPIM instead might well be because it is considered that the evidence is too sensitive to be used in a criminal trial open to press and public. (But see *Guardian v Incedal* [2016] EWCA Crim 11 in which the press were excluded from parts of the trial due to sensitivity of the evidence.)

One result of the increasing but shifting current threat level has been the striking recent increase in the securitisation of Europe, referred to by an Amnesty Report in 2017, whereas in the UK the counter-terror infrastructure is more established and has featured for over a decade a reliance on the preventive measures considered, including non-trial-based liberty-invading measures on the control orders model. This chapter will argue therefore that in the UK, since the interplay between human rights norms and such measures has a longer post-9/11 history, that has led to a somewhat surprising degree of reconciliation between them.

## 2. The Prevent strategy

The Prevent strategy is one of the four pillars of Contest, the government’s overall strategy for countering the terrorist threat to the UK post-9/11, which was renewed in June 2018. Alongside Prevent, the other strands of the CONTEST policy comprise: Pursue - gathering intelligence to

understand the terrorist threat, detecting and disrupting terrorist networks, working with partners abroad; Protect (improving border security, reducing vulnerability of key sites such as utilities and transport) and Prepare, focusing on the capacity to deal with the consequences of terrorist attacks and the continuous testing and evaluation of preparedness (Home Office 2006, pp1-2). The Contest strategy prior to 2009, under the then Labour government, referred to the need to disrupt *violent* extremism which was designed to draw people into terrorism (Home Office 2006, p3). It was adopted after the 7/7 terrorist attacks in London leading to the shift in the Contest strategy to address domestic terrorism. As mentioned, a number of aspects of the strategy were placed on a statutory basis in Part 5 CTSA. The Prevent duty is captured in section 26 CTSA which provides that a specified authority must, when exercising its functions, have ‘due regard’ to the need ‘to prevent people from being drawn into terrorism’. (Such an authority is one listed in Schedule 6 CTSA. Under s 26(3) the duty does not apply to certain functions of the authority; subsection (3) covers the possibility that specified authorities have a range of functions, or act in a variety of capacities, and that it is appropriate that the exercise of only some of those functions is subject to the duty, or that a specified authority is only subject to the duty when acting in a particular capacity.) Below, the operation of that duty in universities and in schools is discussed, on the basis that the education sector has referred more persons (referral is discussed below) under the duty than other sectors (in 2017 the education sector referred 32% of all individuals referred, a higher percentage than in all other sectors (Home Office 2018c, para 1.1)).

## ***2.1 Universities and Further Education Institutions***

The very broad provision of s26 CTSA is given a degree of form by the Guidance to universities and Further Education Institutions (FEIs) that the Secretary of State has issued under section 29(1) (Home Office 2015). It states: ‘Some students may arrive at RHEBs (relevant higher education bodies) already committed to terrorism; others may become radicalised whilst attending a RHEB due to activity on campus; others may be radicalised whilst they are at a RHEB but because of activities which mainly take place off campus’ (Home Office 2015, para 2).

Part 5 and the Prevent Guidance requires universities and FEIs to create and manage

appropriate systems to safeguard students from being drawn into terrorism. But a university has no legal power to refer anyone to a de-radicalisation programme. Local authority Prevent panels, to which students and others may be referred, can consider referral to a de-radicalisation programme amongst a range of options, although such referrals are rare; for example, only 381 out of a total of 7,631 Prevent referrals from all sources (5%) received support for de-radicalisation (Home Office 2017, para 1.1). The Secretary of State was required to appoint an ‘appropriate body to monitor compliance with the Prevent duty’ (Home Office 2015a, para 35) and HEFCE was given that responsibility in relation to universities, until its role was taken over by the Office for Students in 2018. The Secretary of State for Business, Innovation and Skills delegated to HEFCE responsibility for monitoring compliance of the Prevent duty for relevant English higher education providers, which came into effect on 21 August 2015. In September 2018 the Office for Students published an ‘Updated framework for the monitoring of the Prevent duty in higher education in England’, setting out its future monitoring of higher education providers’ implementation of the statutory duty and instructing the providers to submit a short annual report every year, summarising any relevant evidence demonstrating their continuing active and effective implementation of the Prevent duty. In Wales, the Prevent duty is at present monitored by the Higher Education Funding Council for Wales (HEFCW).

In 2017 HEFCE found that the vast majority of universities had responded positively and effectively to the statutory duty. Institutions put their policies in place in 2016 and submitted their ‘Prevent action plans’ to HEFCE in January and April 2016, providing self-assessments of their level of preparedness to comply with their new duties. HEFCE found in 2017 that the response of HEIs to HEFCE’s monitoring role had been positive as risk-based and proportionate (80% of respondents took that view; para 37). But if the Secretary of State is satisfied that a University has not discharged the section 26 duty she can give it directions to enforce the performance of the duty (under section 30). (In Higher Education Institutions and Further Education Institutions the Guidance promulgated makes it clear that the duty under s 26 applies to the expression of visiting speakers, students or staff (Home Office 2015a paras 7-11; Home Office 2015b paras 5-9). In publicly-funded FEIs governance would be reviewed, and ultimately dissolution of the institution could occur (Home Office 2015b, para 30). In respect of non-publicly-funded institutions their contract could be terminated by the Skills Funding Agency. (In 2016 the Office for Standards in Education, Children's Services and Skills (Ofsted) found that certain FE providers were struggling to discharge their Prevent duties.)



The Guidance focuses in particular on the possibility of restricting a range of forms of expression in Universities and FEIs, including that of visiting speakers (Home Office 2015a, para 7; 2015b para 5). In order to comply with the Prevent duty ‘all RHEBs should have policies and procedures in place for the management of events on campus’, which cover staff, students and visiting speakers. The policies in place relating to the management of events and use of premises must clearly state what is required in order for an event to take place. So a University is also responsible for relevant decisions of the student union or a student society (2015a, paras 6-7). The Guidance applies to events on campus, but also to those off-campus but associated with the HEI (2015a, para 12). In relation to campus speaking events (as distinct from teaching) the Guidance implies that if the anticipated expression does not appear to be likely to infringe existing provisions on hate speech or other relevant provisions (discussed in Part 4 below) the institution would still have to take account of the duty, which could require placing curbs on expression which go beyond the existing laws (2015a, paras 7, 10, 11).

The vetting of external speakers by universities under the section 26(1) duty as fleshed out in the Guidance clearly has some impact on freedom of expression (protected inter alia under section 31 CTSA), even though it does not necessarily amount to a bar on speech, since it could have an inhibitory impact on inviting speakers, and could operate as a precursor to cancellation of a speaking event. Universities need to ensure in relation to ‘at risk’ speakers that a speaker opposed to their views also speaks at the same event, or an independent chair is appointed *if* so doing could fully mitigate the risk created (Home Office 2015a, para 11). So under this Guidance, when HEIs are deciding whether to host a speaker they should pay particular attention to the views being ‘expressed, or likely to be expressed’, by considering whether they ‘convey extremist views which may result in drawing people into terrorism’. Under the Guidance if the speaker appears to present a risk that such views may be expressed, the institution must cancel the event unless it is ‘entirely convinced that it can *mitigate fully* the risk without cancellation’ (emphasis added) (2015a, para 11). It might be thought that a risk could be mitigated if such speakers are challenged by opposing views at the same event (either from the Chair or an opposing speaker), although the need to put an opposing speaker in place could itself have some inhibitory impact on enabling expression to occur. Under the Guidance, however, but not under section 26 itself, if there is ‘any doubt’ as to full mitigation of the risk, the event should not be allowed to proceed.

In *Butt v Secretary of State for the Home Department* ([2017] EWHC 1930), however, the question whether a speaking event must be cancelled if any doubt as to mitigation has arisen received clarification. The case was brought by Salman Butt since he had been named in a Downing Street press release about the use of the Prevent duty to stop extremists radicalising students on university campuses. He was listed as one of six speakers who had given talks on campuses, and in the release he was said to have views that violated British values ‘such as democracy, free speech, equality and the rule of law’, including supporting FGM. He challenged his listing in the release as having such views, as well as aspects of the Guidance, although, as the court found, he had not been de-invited by a University under the Guidance. His challenge to the lawfulness of the Guidance failed, partly on the basis that it is merely expressed to be ‘guidance’, and section 26 only requires that ‘due regard’ should be given to preventing persons being drawn into terrorism. It was found that universities must ‘consider the degree to which they have mitigated the risks as fully as they realistically can...But that done, they are not in breach of their duties under sections 29, 26 or 31 if they decide to proceed’ ([60]). It was noted that such a decision would not comply with the terms of the Guidance but that it is not law, in contrast to the duty under section 31 to protect free speech. It was further found that the Guidance is not ultra vires the section 26 duty since it was not found to ‘equate non-violent extremism with terrorism’ ([30]). A significant Report on campus speech from the Joint Committee on Human Rights (JCHR) in 2018 received no clear evidence that any campus speaking events had been cancelled solely due to the operation of the Prevent duty (para 70).

Following *Butt*, flexibility as to the interpretation of the Prevent duty in practice is possible, and there is some recent evidence from HEFCE that a flexible approach is being taken in universities. HEFCE found in 2017 that:

‘... [providers had responded] by putting in place consistent systems which enable them to carry out ‘due diligence’ on external speakers before events are approved, and to identify any risk of unlawful speech which should not be allowed to go ahead, or any risks which might need to be managed to allow an event to proceed safely. [There was also] evidence of strong processes for assessing the risks around events organised by students and staff, which ensured that events identified as ‘high-risk’ could be escalated to an appropriately senior level for a decision to be taken on what mitigation might be needed.’ (2017, para 32)

The assumption was not that events would readily need to be cancelled.

After *Butt* it may be concluded that the Prevent duty as it operates in universities and FEIs does not appear to be likely in practice to have a significant impact on rights to freedom of speech as protected under Article 10 ECHR, received into domestic law under the Human Rights Act (HRA) 1998 (Greer and Bell 2018). But a challenge is possible: a speaker seeking to challenge a rescinding of an invitation to speak in a university (or FEI) apparently linked to the Prevent duty (it could instead be based on public order grounds or the equality duty under the Equality Act 2010) would have to demonstrate that he/she was a ‘victim’ of the alleged breach under s 7 HRA. It was found in *Butt* that the claimant was not a victim since there was no evidence that he had been de-invited in respect of a speaking event by a university as a result of his listing.

As is well established, the term ‘expression’ in Article 10 covers all sorts of expression, including shocking or controversial material (*Handyside v UK* (1979-80) 1 EHRR 737; *VBK v Austria* (2008) 47 EHRR 5), although limits have been recognised, such as in *Gough v DPP* ([2013] EWHC 3267) in which public nudity as a form of expression was found to be ‘threatening, abusive, insulting or disorderly’ under section 5 Public Order Act 1986 in the context of Article 10 ECHR, and the interference was found to be justified in *Gough v UK* ((2014) ECHR 1156). Thus Article 10’s ambit could encompass extremist expression contrary to British values as defined in the Prevent Guidance, such as expression that is intolerant of different faiths and beliefs (eg *Giniewski v France* (2007) 45 EHRR 23). So any interference with such expression would fall within Article 10(1).

However, a breach of Article 10 might be difficult to establish in relation to measures adopted under Prevent in universities (assuming the ‘victim’ hurdle was overcome in the particular instance) since the scope of Article 10(1) is curtailed by Article 17, which provides that there is no ‘right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms’ of the ECHR. Article 17’s rationale and purpose is to prevent exploitation of the ECHR rights, and especially the civic rights of Articles 8-11, by individuals or groups in order to destroy the liberal values which those rights reflect and defend. An illustration of its use arose in the case of *Norwood v UK* ((2005) 40 EHRR SE11) in which the far-right applicant, who was a regional organiser for the British National Party, a far-right party opposed to liberal values, sought to rely on Article 10 to challenge his conviction for an offence under s5 Public Order Act 1986. His conviction related to the display outside his home soon after the 9/11 attacks for four months of a large poster with a photograph of the Twin Towers in flames and the words ‘Islam out of Britain—Protect the British People’ as part of a BNP-endorsed anti-Islam agenda ([111]). The Strasbourg Court declared the application inadmissible, relying

on Article 17, despite accepting that the poster was neither a call to violence nor likely to inspire a violent reaction in the area ([113]-[114]), because it amounted to a ‘general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination’. The Court appeared to accept that due to the engagement of Article 17, the claim fell outside the scope of Article 10.

A further illustration of the use of Article 17 is provided by the case of *Belkacem v Belgium* (Application no. 34367/14); ECHR 2017) in which a Salafist preacher, leader of Sharia4Belgium, was convicted for offences relating to incitement and discrimination in the wake of Salafi-inspired Islamist terrorism in Belgium. The applicant’s complaint under Article 10 was declared inadmissible, because ‘defending Sharia while calling for violence to establish it could be regarded as “hate speech”, and...each Contracting State was entitled to oppose political movements based on religious fundamentalism’ (ECHR 2017, p2-3). The approach to Article 17 in *Norwood* and in *Belkacem* indicates that applicants (such as external speakers in universities facing an interference with expression due to Prevent) would be unlikely to be able to rely successfully on Article 10 if they were associated with, attached to or representative of groups opposed to the liberal values that underpin the ECHR, such as the BNP in *Norwood* or Sharia4Belgium in *Belkacem*.

If Article 10(1) was found to be engaged by the use of measures in universities (or FEIs) linked to Prevent, the interference might in any event be found to be justified under Article 10(2) if Article 17 was found not to apply. Article 10(2) provides that ‘[t]he exercise of these freedoms... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security... the prevention of disorder or crime... for the protection of the reputation or rights of others’. In *Butt* the claimant argued under s7 Human Rights Act (HRA) that the Prevent Duty Guidance was not ‘prescribed by law,’ on the basis that it did not meet the ECHR test of lawfulness since: it was not drafted with sufficient precision; it contained discretionary powers of uncertain scope; it lacked safeguards against abuse of those powers ([96]). These arguments were rejected, primarily because they misconstrued the nature of the Higher Education Prevent Duty Guidance, which must merely be ‘taken into account’ by a relevant decision-maker in an

institution subject to the s26 duty ([98]). (These findings would apply with equal force to the Guidance applied in schools, discussed below).

In *Butt* it was also considered whether the Guidance was ‘necessary in a democratic society’ to serve one or more of the aims set out in Article 10(2). Justice Ousley accepted the government’s exposition of the fundamental aim of Prevent – to understand and disrupt the processes which draw people into terrorism in the UK – and found that this was ‘obviously’ a legitimate function of government and necessary to protect the rights of others. It was also found that the focus in government policy on combatting non-violent extremism post-2015 was rationally connected to the aim of protecting the rights of others, on the basis that even non-violent extremism could contribute to a terrorist threat for the reasons given by the government, as set out in the Command Paper on counter-terror strategy in 2015 (ie by justifying violence, promoting hatred and division and encouraging isolation, [127]; see also Home Office 2015c, para 7). The claimant in *Butt* sought to argue that the Guidance was not a necessary measure in a democratic society because it was intended not only to deter those condoning extremist violence, but also to ‘prevent people being “drawn into non-violent extremism”’. This interpretation of the aim of the Guidance was rejected on the basis that ‘[t]he guidance is about the section 26 duty; it is therefore about preventing people being drawn into terrorism *through non-violent extremism*’ (my emphasis) ([129]).

The claimant in *Butt* further argued that the Guidance could not be shown to be necessary in terms of Article 10(2) on the basis that there was insufficient evidence that non-violent extremism contributed to drawing people into terrorism. Justice Ousley accepted that the forms of expression of non-violent extremism that can draw people into terrorism were not susceptible to precise definition or to being clearly evidenced ([132]), and noted that the Secretary of State had not produced evidence of individual case-studies or statistics that demonstrated that individuals had been drawn into terrorism partly due to encountering non-violent extremist expression. However, it was found that due to the complexity of the issue, the emphasis placed on protecting fundamental freedoms in combatting non-violent extremism in the Guidance, the approval of Parliament for the Guidance, and the expertise of the Home Office in assessing the risks posed by non-violent extremism, the Court would require clear evidence that non-violent extremism could not draw people into terrorism ([134]). Justice Ousley found that no such evidence had been presented.

Justice Ousley also considered whether, given the disputed nature of the evidence, a *possible*

connection between non-violent extremism and drawing people into terrorism could be shown, as relevant to the necessity of the Guidance under Article 10(2). He found that non-violent extremism could create a ‘framework of a sense of separateness, alienation, victimhood... at one with a rigid and pure version of religion or ideology’ that was capable of justifying violence ([137]). He found that when a view is part of a ‘rigid and pure’ ideology that seeks to change UK law to reflect that ideology through non-violent democratic means, then this was non-violent extremism and *furthermore* created a risk of drawing others into terrorism, because ‘[t]he argument might lead others, persuaded by it of the merit of the aim, to reject the means’ ([138]). This was an important clarification of the relationship between the Guidance and the s26 duty. The Guidance was therefore found to satisfy the tests under Article 10(2) (at [127-128], [140-152]). These findings would clearly also apply to alleged curbs on expression under the Prevent Guidance relating to FEIs and schools. So it is likely that disputing Home Office evidence as to the necessity of following Prevent in the education sector under Article 10(2) would be extremely difficult for an applicant, especially given the fact that after the *Butt* case the Home Office has begun to release statistics on Prevent and to make specific case-studies available, such as those used in official training on Prevent (Home Office 2018d; Educate Against Hate 2018). The findings of the necessity of the Guidance in terms of Article 10(2) would apply more strongly to schools, given the greater vulnerability of school children, and their greater susceptibility to external persuasion, as compared to students.

If a claim was brought in future respect of the impact of the Guidance on one or more external speakers in universities (or FEIs), the question would also arise whether the interference complained of went beyond what was necessary under Article 10(2) (was a disproportionate interference). It would be significant that, while interference with speech of political or moral import requires a ‘particularly weighty justification’ under Article 10(2) ([112]), the Guidance, and s26, does not require censorship of such speech, or create criminal or civil sanctions if extremist speakers speak in an institution. Rather, it requires that universities and FEIs should seek to mitigate the risk posed by certain speakers by ensuring that ‘balancing’ speech occurs at the same event. For these reasons the degree of interference with speech would be likely to be found to be minimal following the findings in *Butt* in relation to university speakers ([141]). Thus, in terms of future challenges under the HRA the impact of the Prevent duty would almost certainly be deemed to be a measure that went no further than necessary in accordance with the demands of proportionality under Article 10(2).

In conclusion, it is clear that despite concerns expressed by some groups as to a general chilling

effect created by the Prevent Duty Guidance as it applies in universities and FEIs (and schools), that concern is unlikely to be captured as a violation of the Article 10 rights of any specific individual. Further, following *Butt*, so long as the institution had sought to manage the risk associated with a speaker, it could, under s 26, allow the event to go ahead even if a doubt remained as to mitigation of the risk. A duty, moreover, which fosters pluralistic debate rather than allowing the expression unchallenged of a narrow, socially conservative view is, it is argued, more likely to promote free speech than to inhibit it (Black 2017, p4; Student Rights 2016). As discussed, due in part to the effects of Article 17, speech that promotes discrimination against various groups has been found to fall outside the protection of Article 10 ECHR (guaranteeing the right to freedom of expression) by the Strasbourg Court. (See: *Belkacem v Belgium* (2017) ECHR 253; ECommHR, *Otto EFA Remer v Germany* (app no 25096/94, judgment of 6 September 1995); *Witzsch v Germany* (App No 41448/98, judgment of 20 April 1999); *Garaudy v France* (app no 65831/01, judgment of 24 June 2003). Similarly in *Pavel Ivanov v Russia* (app no 35222/04, judgment of 20 February 2007) a speaker who had attacked Jews was found to be unable to rely on Article 10 since he fell within Article 17 ([1]). In *M'Bala M'Bala v France* (App No 25239/13, judgment of 10 November 2015), the Court found that a French comedian's show was a demonstration of hatred, anti-Semitism and support for Holocaust denial. The Court considered that even if the performance was meant to be satirical it did not fall within the protection of Article 10, under Article 17 ([39]).)

## 2.2. Schools

As mentioned, Part 5 CTSA covers schools; the s29 Guidance addressed to schools states that 'schools should have regard in particular to disrupting promoters of terrorism, to identify and support those at risk of being drawn to terrorism, and to disrupt the process by which such individuals come to support terrorist groups and 'extremist ideology' ('radicalisation') (Home Office 2015d para 6). Extremism is defined in the guidance to include 'vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs' (para 7). The focus of the Prevent strategy under the previous Labour government was on violent extremism (Home Office 2006, para 6). The current strategy, largely captured in section 26 CTSA and the Prevent Duty Guidance, also covers the harms of non-violent extremism, such as social division and the encouraging of isolation, as it does for universities and FEIs, as discussed above (Home



Office 2015c). The key requirements of the Prevent duty are now set out in the revised Prevent duty Guidance (Home Office 2015d), and the dedicated Guidance for schools.

If maintained schools funded by the local authority fail to avoid breaches of the Prevent duty that failure is primarily overseen by Ofsted, and could result in intervention measures, such as school closure or the imposition of special measures (Education and Inspections Act 2006 Part 4). In respect of academies funded by central government, failure to remedy such breaches could result in the withdrawal of the funding agreement (Academies Act 2010 ss2A and 2D). After 2015 Ofsted used powers to conduct no-notice inspections, in order to reduce the likelihood that schools could present a false image of their practices (Ofsted 2015, para 46; Section 8 Education Act 2005). These powers were a direct response to criticisms that Ofsted had failed to identify problems of extremism in certain Birmingham schools (Education Committee 2015, paras 30-41). (Ofsted responded to the committee's recommendations, saying that one reason for change was a 'culture of fear and intimidation' in such schools after allegations that certain governors and teachers had sought to impose a narrow Islamic curriculum - the so-called Trojan Horse affair, and in particular at Park View (one of the schools at the centre of the affair) which had previously been rated as 'Outstanding' (Education Committee 2015a)). Privately funded schools can choose to be inspected by Ofsted or by an independent inspectorate, but such inspections do not trigger formal enforcement measures. All 'independent educational institutions' must be registered under s96 Education and Skills Act 2008, and Ofsted has powers to inspect and close such institutions.

The duty to counter 'extremism' in order to prevent pupils being drawn into terrorism clearly covers expression in schools that is directly an incitement to terrorism or to violence. It would cover praising the actions of terrorist groups or supporting terrorism, as amounting to the expression of violent extremism capable of creating the risk in question. Therefore it would be covered by both the Guidance and section 26. But the wording of the Guidance also extends to opposing expression amounting to non-violent extremism; it could therefore lead to the curbing or suppression of forms of political expression in schools critical of 'British values' such as a commitment to the rule of law and fundamental liberties. (It should be noted that the government has stated that the overall counter-extremism strategy was designed to help to address the harms of extremism - in particular the support or justification of violence (Home Office 2015c, para 7)). But the Guidance also emphasises at the outset that 'the Prevent duty



is not intended to stop pupils debating controversial issues... [and] schools should provide a safe space in which children, young people and staff can understand the risks associated with terrorism and develop the knowledge and skills to be able to challenge extremist arguments' (Department of Education 2015, p4). Nevertheless, some concerns have been raised regarding the impact of the Part 5 Prevent duty on expression in schools in relation in particular to the reporting/referring of pupils who express extremist views, as discussed below.

The Prevent Duty Guidance states that schools are required to demonstrate that they are able 'to assess the risk of children being drawn into terrorism, including support for extremist ideas that are part of terrorist ideology' (Home Office 2015d para 67), and the DfE Guidance states that schools must have a 'specific understanding of how to identify individual children who may be at risk [of radicalisation]... and what to do to support them' (Department of Education 2015, p5). (This duty is supplementary to the statutory duty under s11 Children Act 2004 which imposes a duty on schools to have regard to the need to safeguard and promote the welfare of children.) The relevant support is to refer a pupil who demonstrates signs of radicalisation to the 'Channel' programme, which is a non-compulsory de-radicalisation programme designed to counteract influences drawing individuals into terrorism. In addition to the fulfilment of s26, such support is required to fulfil the statutory duties placed on school governors and Local Education Authorities (LEAs) to put in place arrangements for safeguarding and the promotion of pupils' welfare under s175 Education Act 2002, for maintained schools, and the Education (Independent School Standards) Regulations 2014, in relation to independent schools.

The Departmental Guidance concerning safeguarding of pupils suggests that the fulfilment of the s26 duty requires schools to have 'clear procedures in place for protecting children at risk of radicalisation' as well as to co-operate with relevant safeguarding and Prevent bodies, such as Local Safeguarding Children Boards (LSCB) and Prevent co-ordinators (in areas which have been identified as Prevent Priority areas). There have been claims that there are large number of referrals, including many frivolous or mistaken ones, although it has been found that a number of such claims have been deliberately exaggerated by an 'anti-Prevent lobby' (CAGE 2013, paras 3.8-3.9; Casey 2016, p152). Filtering mechanisms to prevent such referrals are created by designated Safeguarding Leads (staff specifically concerned with safeguarding pupils under Prevent), and the Chief of Police, who must refer a pupil to a local authority panel *only* if there are reasonable grounds to believe that the individual is vulnerable to being drawn

into terrorism’ (CTSA 2015 s36(1),(3); National Union of Teachers 2015, para 39; Department of Education 2015, p5; Busher et al 2017, para 4.4; JCHR 2017 p15).

Pupils can be referred to Channel due to an individual’s engagement ‘with a group, cause or ideology’ associated with terrorism, which is one of the three key ‘dimensions’ in the vulnerability assessment framework set out in the Channel guidance (the other two being ‘intent to cause harm’ and ‘capability to cause harm’; Home Office 2012). The guidance refers to such engagement factors as ‘needs, susceptibilities, motivations and contextual influences [that]...together map the individual pathway into terrorism... [including] feelings of grievance and injustice... A need for identity, meaning and belonging... A desire for political or moral change’ (Home Office 2012). However, the guidance does not direct that referrals should be made on such a basis but – in common with safeguarding good practice - instead direct attention towards a pupil’s behaviour as a whole, and to the specific question of whether there are reasonable grounds to believe that he or she is vulnerable to being drawn into terrorism (Department of Education 2015, p5). In so far as the Guidance to schools goes beyond the demands of the duty under s26 CTSA, it could be disapplied following the *Butt* case discussed above, since that ruling should also be applied to the Guidance to schools.

## **2.3 Conclusions**

At present it is clear that the Prevent strategy will be maintained and may be strengthened due to the terrorist attacks in the UK in 2017. The Home Office had already confirmed in 2016 that a secret Whitehall internal review of Prevent had been ordered earlier in 2016 by Theresa May when she was Home Secretary (Travis 2016). It concluded that the programme ‘should be strengthened, not undermined’ and put forward 12 suggestions, which are as yet unpublished, as to how to reinforce it. After the terrorist attacks in Westminster on 22 March 2017, Manchester on 22 May 2017 and London on 3 June 2017, Theresa May as PM reaffirmed that the expected review would include ‘a major expansion of the Prevent anti-radicalisation programme’ (Travis 2017). After the terrorist attack in Manchester in May 2017 the (then) Home Secretary, Amber Rudd, reiterated the commitment to strengthening Prevent (Maidment 2017). The Home Office commitment to Prevent was reaffirmed by the new Home Secretary in 2018, but at present it is not clear whether the Prevent strategy will imminently be

‘strengthened’ again after its placement on a statutory basis in 2015 (the Home Secretary has stated that ‘the Prevent strategy will remain a vital part of our counter-terrorism work’; Home Office 2018b).

Following the *Butt* case there does not seem to be a strong argument for abandoning Prevent on the basis of tensions with Article 10 ECHR, and the safeguards available applying to schools make it less likely that it could lead to a finding of a breach of Article 8 ECHR (the right to respect for private and family life), given the qualified nature of the Article. (Article 8(2) states that ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’) But it might be concluded instead that there is a case for abandoning Prevent on policy grounds on the basis of assessing its efficacy in countering radicalisation. On the one hand there is limited evidence that it has had an impact in countering extremism among children, or students, while on the other activist groups have to an extent succeeded in portraying Prevent as a means of spying on and stigmatising Muslims, thereby fostering a grievance narrative among some groups (JCHR 2017, paras 36-42). Therefore it has been suggested by some politicians that it may have counter-productive effects and could have aided in promoting radicalisation in some communities (that includes the Home Secretary in June 2018, although he did not consider that it should lead to the scheme’s abandonment: Home Office 2018d). Academics, such as Buscher et al, have advanced similar criticisms (2017, para 4; see generally JCHR 2017, p15). It has also been suggested that it could affect the willingness of some in certain Muslim communities to co-operate with the police thereby aiding efforts of the security services in countering terrorism by passing on information about radicalised persons (Intelligence and Security Committee 2017, para 40).

But abandonment of Prevent might make it more likely that extremist elements, whether from Islamist groups or from the far-right, could have an influence in some schools. An example of narrowing the curriculum in some schools with large cohorts of Muslim pupils was provided by Tahir Alam, the Chair of the Governors at Park View School from 1997 to 2014. Tahir wrote a report representing the ‘Muslim Council of Great Britain’ in 2007 as a guide for schools

termed 'Towards Greater Understanding: Meeting the Needs of Muslim Pupils in State Schools' which included the following:

Muslims consider that most dance activities, as practised in the curriculum, are not consistent with the Islamic requirements for modesty as they may involve sexual connotations and messages when performed within mixed-gender groups or if performed in front of mixed audiences... Muslims believe that God should not and cannot be represented in any form, whether two-dimensional or three-dimensional. ...girlfriend/boyfriend as well as homosexual relationships are not acceptable practices according to Islamic teachings...All forms of music that may include the use of obscene and blasphemous language....arouse lustful feelings, encourage the consumption of intoxicants and drugs or contain unethical and un-Islamic lyrics would be considered objectionable. For this reason some Muslim parents may express concerns in the way music is taught in school and the extent to which their children may participate in it. Muslim pupils should not be expected to participate in drama or musical presentations associated with celebrating aspects of other religions, such as nativity plays or Diwali...In Islam the creation of three dimensional figurative imagery of humans is generally regarded as unacceptable because of the risk of idolatress (sic) practices...The school should avoid encouraging Muslim pupils from producing three dimensional imagery of humans....When organising overnight trips involving Muslim pupils, mixed-gender groups should be avoided. This will encourage greater participation, particularly from Muslim girls' (Arts and Humanities Community Resources 2007)

Tahir Alam was removed from his position as governor of Park View school as a result of the 'Trojan Horse' scandal in September 2015. His appeal against an order banning him from acting as a governor was rejected in January 2018 (Times Educational Supplement 2018).

Recently the view has gained traction that it is the *image* of Prevent promulgated by some groups, rather than the reality, that has created feelings of grievance. As the counter-terrorism expert and former FBI agent, Ali Soufan, has commented: 'The policy can be successful or not by the way it is perceived... That's why it should be very clear from a branding perspective that we're not only talking about Muslims, we're talking about all sorts of radicalisation' (Saner 2018). Louise Casey's Review in 2016 described 'an active lobby opposed to Prevent'. She found that 'elements of this lobby...appear to have an agenda to turn British Muslims against Britain', whose activism to undermine Prevent she described as making British

Muslims ‘feel even more alienated and isolated – and therefore more vulnerable to extremists and radicalisers’ (2016, paras 10.29 and 10.31). She also found that the lobby had ‘deliberately distorted and exaggerated cases’ of Prevent delivery in an attempt to ‘portray the programme at its worst’. On that argument, the strategy of that lobby appears to be, it is argued, to promulgate Prevent myths, seeking to foster feelings of grievance, and then to utilize such manufactured grievances to persuade politicians and other policy-makers that Prevent should therefore be abandoned, given that its effects might be counter-productive. In the face of such arguments, the Joint Committee on Human Rights concluded in 2018 that Prevent should not be abandoned, but that further efforts should be made to dispel Prevent myths and to make the workings of Prevent more transparent (JCHR 2018, para 78).

As far as schools are concerned, its abandonment might aid in a narrowing of the curriculum in Islamic or Charedi schools which would be likely to lead to a limited and stunted educational experience for some pupils, leaving them more isolated within Western society and less able to obtain employment and post-school qualifications, rendering some of them more vulnerable to radicalisation.

### **3. Preventive executive measures**

#### **3.1 Detention without trial**

Liberty-invading non-trial-based measures, in particular executive detention, have at various times been resorted to by democracies as part of their counter-terror strategies, but the most repressive measures have not been used, in general, post-World War 2, against their own citizens. (During World War 2 in the US 62 percent of those interned were US citizens (Truman Library 1946); the use of internment during the Troubles in Northern Ireland provides an exception to this trend.) In the US the notorious creation of ‘legal black holes’ post 9/11 via executive detention occurred only in respect of non-citizens (Paust 2007). Post 9/11 indefinite detention without trial, but only for non-nationals suspected of engaging in international terrorism, was introduced in the UK under the Anti-Terrorism, Crime and Security Act 2001, Part 4 (ACTSA). The attempt to reconcile the scheme with human rights law via use of a derogation under Article 15, from the right to liberty under Article 5 ECHR, eventually failed (see further Chap 00 in this volume.). The then Labour government had in effect by derogation

post-9/11 attempted to introduce a state of exception whereby the right to liberty was disapplied to the extent demanded by the measures (it also derogated under Article 4 from Article 9 ICCPR; see further on the matter of such exceptions Agamben 2005, chap 2).

A majority of the House of Lords resisted the attempt to rely on the derogation under Article 15, finding in the seminal *A and Others v Secretary of State for the Home Dept* case ((2004) UKHL 56) that while the executive was entitled to decide when a state of emergency arose, less deference would be shown in considering the extent of the exceptional measures then imposed. Under that less deferential approach the Lords found that the measure taken failed to satisfy the demands of proportionality under Article 15(2), largely because they only applied to non-nationals (Arden 2005). It was found that if the risk posed by suspect nationals could be managed without resort to detention without trial the rational connection between the impact of Part 4 and the protection for national security was in doubt. Further the scheme was found to be over-broad since on its face it could have been applied to non-national suspects, such as members of the PKK, posing no threat to the UK and unlinked to 9/11 or Islamist terrorism ([44]). The decision in *A*, it is argued, supports the notion that s6 HRA (placing a duty on public authorities, including courts, to abide by the ECHR) tends to diminish the role of judicial deference, due to its direct injunction to courts to abide by the ECHR (Arden 2005; Steyn 2005). As Simon Brown LJ notes, in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at 746 ‘The court’s role under the Human Rights Act is as the guardian of human rights. It cannot abdicate this responsibility’ (see also Kavanagh 2011; Tomkins 2010). That finding was, however, not accepted by Ewing, a long-standing critic of the HRA, who found that the futility of the HRA was largely confirmed by the *A* decision on ACTSA Part 4: ‘By accepting that there is a national security threat on the most gentle standards of review, the House of Lords has given the green light to almost as offensive legislation in the form of the Prevention of Terrorism Act 2005’ (2004).

### **3.2 Control orders**

The government responded to the resultant s4 HRA declaration of incompatibility in *A* between Part 4 and Articles 5 (the right to liberty) and 14 (the right to non-discrimination) ECHR issued by the House of Lords, by introducing control orders under the Prevention of Terrorism Act 2005 (PTA). The introduction under the PTA of derogating control orders, but without

activating them, indicated that there was some acceptance on the part of the executive that the formal mechanism enabling it to declare a state of emergency to deploy exceptional measures – Article 15 ECHR – should not be invoked. Control orders were applicable alike to suspect nationals and non-nationals as the replacement measure for Part 4, with Parliament’s consent, given in passing the PTA. Orders on this model rely on targeting terrorist suspects to curtail their liberty without the need for observing the due process protections of a trial, by imposing specific restrictions on them, with the aim of preventing future terrorist activity before it occurs. Reliance on measures on this model allows for punitive restrictions but avoids the safeguards accompanying a criminal trial, including the need for proof to the criminal standard. Measures on this model therefore demand a radical departure from procedural and constitutional normality since liberty is curtailed without the need for a trial. Introduction of the orders revealed a governmental determination to continue to rely on non-trial-based measures, but falling short of imposing imprisonment.

The scheme on its face handed the executive apparently unlimited power to impose restrictions on suspects (S 1(3) PTA placed no limits on the obligations that could be imposed), with fairly minimal judicial supervision (an obligation could only be quashed at the initial hearing if the Secretary of State’s decision to impose it was ‘obviously flawed’ - s3(2)(b), and at the next hearing, under judicial review principles s3(10)). At the same time the lack of a derogation to protect the orders meant that they had to be judged via the HRA directly against ECHR standards.

As indicated, derogating control orders were introduced, which could have allowed a return to detention without trial for suspect terrorists, but under pressure from Parliament they were never deployed in practice. As regards non-derogating orders, reconciliation with human rights norms had to occur by a means other than resorting to a derogation. It was therefore left to the courts to consider their response to the orders under the framework created by the Human Rights Act; the availability of the orders meant that executive emergency powers faced potential control by reference to human rights norms. In their early iteration as ‘heavy-touch’ orders (see, for example, the order at issue in *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642), non-derogating control orders were designed to approach or over-step ECHR parameters, so in effect they relied on judicial reinterpretations requiring a minimising recalibration of relevant ECHR rights, involving exploiting their gaps and ambiguities, and leading in effect to emptying Articles 5 and 6 of part of their content by re-determining their



ambits. In 2009 a report on global terrorism by the International Commission of Jurists identified this trend in the UK and other countries in the face of terrorism, a trend, the Jurists' Panel found, most overtly expressed to them by the then UK Home Secretary (at 91). The repressive nature of the early control orders – which included eighteen hours house detention a day, sometimes combined with forced relocation, indicated implicit reliance on a minimised notion of the concept of 'deprivation of liberty' under Article 5. (The Secretary of State argued in *JJ* that in the security climate, the concept of deprivation of liberty in Article 5 should be interpreted with particular narrowness (see further Fenwick 2011; Fenwick and Phillipson 2011)). The courts were also impliedly required to reinterpret the fair trial right under Article 6 in a minimising fashion in respect of the process of reviewing the orders (see *Secretary of State v MB* [2006] EWHC 1000).

The courts' response to the scheme was, to an extent, to resist minimisation of the rights, especially in certain key House of Lords' decisions; judicial modifications relying on ss 6 and 3 HRA, imposed, as Gearty put it, a 'civil libertarian dilution' on the scheme (2010, p586). Such decisions brought the scheme into closer compliance with both Articles 5 and 6 ECHR, meaning that it became in various respects, less repressive. In particular, it was found that 18 hours house detention a day, combined with other restrictions, would breach Article 5 ECHR, so shorter periods had to be imposed deemed not to create a deprivation of liberty in *JJ* and *Secretary of State for the Home Department v B and C* ([2010] 1 WLR 1542) and *Secretary of State for the Home Department v AP* ([2010] 3 WLR 51).

The Court of Appeal also found in *MB* that s3 HRA should be deployed so as to read the provisions relating to court review of the orders to render them compatible with Article 6. At Strasbourg it was later found under Article 6 that in review proceedings (in respect of Part 4, a challenge brought before imposition of control orders), the gist of the case against the controlees had to be disclosed to him in the proceedings (*A v United Kingdom* (2009) 49 EHRR 29 (Grand Chamber)). That decision was then applied to domestic law via ss2 and 3 HRA under Article 6(1) in *Secretary of State for the Home Department v AF (No 3)* ([2009] 3 WLR 74). However, although the courts' response to the control orders' scheme meant that specific orders (such as in *AF*), and therefore the scheme itself, had to be modified to achieve greater ECHR-compatibility, the courts had also partially acquiesced in the notion of finding that the ECHR could accommodate the scheme by accepting somewhat attenuated versions of Article 5 and 6 (Fenwick and Phillipson 2011; Walker 2007). Since significant interferences with liberty



without trial, although not of the extensive nature demanded by the initial iteration of the scheme, had been accepted by the courts as compatible with Article 5, such interferences could then be viewed as having received a degree of judicial imprimatur. Interferences included some acceptance of up to 16 hours a day house detention in *JJ* ([105]), which could be combined with forced relocation where no special features particularly ‘destructive of family life’ arose (*AP* [19]-[24]). That was even more clearly the case in respect of the acceptance, but only once gisting was in place, that relying on closed material proceedings to impose the orders was compatible with Article 6. Ackerman’s view, however, that judicial control over the exercise of executive power in times of crisis cannot be relied on because the judges will always tend to defer to the executive was *not* fully supported by the judicial response to the scheme (2006).

### **3.3 Replacing control orders with less repressive TPIMs**

The attempt to reconcile control orders with human rights law via quashing of certain orders and modifications of the scheme, which may have contributed to the marked under-use of the orders, was not found to have created an acceptable scheme by the Coalition government in 2011 (Anderson 2012, p5). Influenced by the Liberal-Democrats, it decided to abandon them while retaining a version of the control orders model in more Article 5-compliant TPIMs under the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). As indicated, following the model of Part 4 ACTSA preventive detention, control orders could be imposed by the Home Secretary, but with court review, on the basis of reasonable suspicion; that model was then also used for TPIMs, except that the standard of proof was initially that of ‘reasonable belief’ (see p00). It might be asked why this model, based on the preventive value of controlling the activity of suspects, was retained at all, given the low numbers of control orders imposed and the number of successful challenges to the orders that had been mounted. It was arguable, as considered above in relation to Prevent, that use of control orders as a preventive measure was not worth the cost of their use, especially as they could be presented to some Muslim communities by activist groups as a repressive measure targeted only at Muslims (the orders were in fact only used against Muslim suspects: CAGE 2009, p6, albeit very sparingly). They could therefore have had a counter-productive impact in aiding in radicalization and in dissuading some Muslims from co-operating with the police in providing information about suspects.

But the value of reliance on the control orders model received the support of the Counter-terror Review 2011 (Home Office 2011), of the then independent reviewer of terrorist legislation (Anderson 2012, para 6.2) and, to an extent, as discussed, of the courts. However, the contribution of the Coalition government to producing a more restrained version of measures on the control orders model went beyond the tempering impact achieved by the courts, while also being influenced by the court-based interaction that had occurred between the ECHR and the control orders scheme, under the HRA framework. This episode therefore provides some support for the view that subjecting counter-terrorism measures to judicial review is crucial to maintaining constitutionalism, while also demonstrating that governmental and Parliamentary input, on occasion, is influenced by such review but may make a stronger contribution to protecting human rights (de Londras and Davis 2016).

The design of TPIMA indicated that lessons had been learnt from the ECHR-based control orders litigation, and arguably also from the perception that the use of the scheme may have had some counter-productive effects. Under the non-derogating control orders regime *any* obligations that the Secretary of State considered necessary for the purpose of preventing or restricting involvement in terrorism-related activity (TRA) could be imposed, with the implied requirement that they did not breach the ECHR, in particular Article 5. Although certain orders were quashed on the basis that they were in fact derogating orders which the Home Secretary had had no power to make, as in *JJ*. (It should be noted that the obligations listed in the PTA were, formally speaking, illustrative only (s1(3) PTA), although in practice they were relied on.) As discussed, the courts found that limits had to be placed on the periods of house detention, combined with other restrictions, that could be imposed. The Coalition government brought before Parliament an even more restrained scheme under TPIMA, which is still in force at present.

TPIMs, as softened control orders, allow for much briefer periods of house arrest than the periods courts had accepted under control orders as not necessarily entailing a deprivation of liberty. Under TPIMA the obligations are specified and are also more limited; they are clearly designed to ensure that Article 5 is very unlikely to be breached, taking account of the control orders case-law. The lengthier house detention requirements under control orders were relaxed, becoming only an ‘overnight residence requirement’ (TPIMA sched 1 para 1), and the forced relocation provisions (imposing relocation away from the original residence of the suspect to another part of the country) were dropped under the original iteration of TPIMs. TPIM orders

provide for a range of more limited restrictions relating to movement (including electronic tagging - TPIMA, sched 1 para 12), communication (sched 1 para 8(2)(a)) and property (sched 1 para 6). The restrictions also include requirements to report to the police (sched 1, para 10), a requirement not to carry out specified work or studies (sched 1 para 9) and prevention of travel abroad (without permission of the Secretary of State (TPIMA, Sched 1 para 2). A TPIM also has far less impact on liberty long-term since it can only be imposed for a two-year maximum period (TPIMA s5(1),(2),s13(7)). (A fresh TPIM can then be imposed if a reasonable belief can be shown that ‘new’ terrorism-related activity has occurred after the imposition of the first notice (ss3(2), (6)(b); see also (6)(c)).) In contrast to the previous control orders regime, no TPIM has so far been quashed, as opposed to varied, on ECHR grounds, by the courts (see Third Delegated Legislation Committee 2016, col 10).

But TPIMs, like control orders, were under-used, leading to the criticism that they were too ineffective to deploy (they were ‘withering on the vine as a counter-terrorism tool of practical utility’ JCHR 2014, p5). Two TPIM subjects absconded in 2012 and 2013, and only three TPIMs were still in force by 31 August 2015 (Home Office 2015e, p22). Yvette Cooper, then Shadow Home Secretary, repeatedly criticised TPIMS on this basis:

There are currently no TPIMs in use because the experts have warned that the police and the security services do not believe they are effective enough to be worth using... (Watt 2014; HC Deb Vol 585, Cols 24-6, 1 September 2014).

The truth is that TPIMs have not worked. Despite the increased terror threat, only one is in place at the moment and it relates to someone who has left prison. TPIMs simply do not contain enough powers to be useful for the agencies or the police, or to be worth the extra effort involved (HC Deb Vol 589 Col 221, 2 December 2014).

Their lack of use, and the perception of their inefficacy, led to the recommendation that they needed strengthening, which occurred under the Counter-Terrorism and Security Act 2015 Part 2 (CTSA), meaning that in terms of repressiveness the current iteration of TPIMs resembles control orders somewhat more closely. In particular, the forced relocation obligation previously available under control orders was reinstated by CTSA in somewhat modified form (Sched 1 para 1(3)(b), (3A) TPIMA). The reintroduction of forced relocation was clearly the most dramatic change to TPIMs, but CTSA also amended TPIMA to impose a new travel measure, allowing travel to be restricted outside the area where the TPIM subject lives (Sched 1 para 2(2) TPIMA); new prohibitions relating to access to firearms and explosives were also included

(Sched 1 para 6A TPIMA). In furtherance of de-radicalisation suspects can also be required to attend appointments with specified persons (Sched 1 para 10A(1)). The CTSA also significantly increased the penalties available for breaching the TPIMs obligation preventing travel abroad. (The penalty for breaching the obligation without permission of the Secretary of State (TPIMA, Sched 1 para 2) was increased from 5 to 10 years (s23(3A)), and if the measure is breached by leaving the UK, amendment under s17 CTSA disallows reliance on a 'reasonable excuse' for doing so (s23(1A)). In the impact assessment that accompanied the Act, the Government anticipated that these changes to the TPIM regime would lead to a significant increase in the use of TPIMs ('best estimate...10 additional TPIM cases a year.' Home Office 2014, p7), and an increase in their use from mid-2016 onwards then occurred, but the number of TPIMs in place, even in their somewhat strengthened form, remains low at the present time (there were 6 TPIMs in force as of 31 August 2018, HCWS1050). Initially, the coming into force of CTSA had no impact on usage of TPIMs; only two TPIMs were in force early in 2016, and then only one (see The Telegraph 2016; *EB v Secretary of State for the Home Department* [2016] EWHC 137).

But, significantly, lessons had again clearly been learnt from the interaction between the control orders regime and human rights law: the safeguards under TPIMA were also improved by CTSA. Thus, TPIMA, as amended in 2015, allows a wider range of TPIMs restrictions to be deployed, but only so long as proof of involvement in terrorism-related activity (TRA) to the civil standard is available, not merely reasonable belief (s20(1) CTSA, amending s3(1) TPIMA). The definition of TRA was also somewhat narrowed, but since it relies on the definition of terrorism in s1 TA it still remains a broad definition (see for criticism eg Anderson 2016, pp24-26). The 2015 changes also did not include reintroducing the longer periods of house arrest available under control orders; nor did they extend the time period during which a TPIM can subsist. The reinstated forced relocation obligation clearly takes account of the Article 5-based control orders litigation to the effect that if the relocation causes an unusual degree of social isolation it is capable of leading to a finding of a deprivation of liberty under Article 5 (*SSH D v AP* (2011)). So even when that obligation was reinstated, the scheme was still unlikely to be found to have breached Article 5 due to its creation of a deprivation of liberty than the scheme accepted by the courts as – in certain circumstances – creating such a deprivation had done in 2010, because the current obligation (arising under s16(2) CTSA, amending Sched 1 TPIMA) only allows for relocation over 200 miles from the TPIM subject's residence if he/she consents. But the level of scrutiny of use of TPIMs was somewhat

diminished under CTSA (the role of the Independent Reviewer was altered in a number of respects, including relaxing the requirement that a report must be produced every year (s45(3)), and annual Parliamentary scrutiny was not introduced. Current Parliamentary scrutiny is minimal; the Secretary of State placed a written statement on the exercise of her powers before the House every quarter since TPIMA came into force in December 2011 (Home Office 2016a, para 76). The continuation of TPIMA only requires Parliamentary consideration of its renewal every five years, under s21, in contrast to the PTA, which required annual renewal. The independent terrorism reviewer, the intelligence services commissioner and the director general of the Security Service must also be consulted by the Secretary of State.

The potential use of ss3 or 6 HRA (reinterpreting or applying the TPIM powers in accordance with the ECHR), combined with the softening of TPIMs as compared to control orders, means that the measures can continue to operate within the human rights framework created by the ECHR and HRA combined, rather than outside it. Thus, it may now be found that even the more ‘heavy touch’ measures on this model in the form of strengthened TPIMs do not presuppose a derogation by stealth, but rather indicate that the anticipated flexibility of both the statutory scheme and Article 5 standards due to reliance on s3 HRA, and the impact of the Strasbourg jurisprudence under s2, means that use of a derogation can be avoided.

### **3.4 Lack of deployment of enhanced TPIMs**

However, there seemed to be a lack of confidence from the outset in the efficacy of TPIMs in a crisis situation. As a result s26 was included in TPIMA; the section makes provision to introduce enhanced TPIMs, measures similar in nature to the early control orders, if it is urgent to do so when Parliament is in recess. Section 26(1) provides that the Secretary of State ‘may make a temporary enhanced TPIM order [while Parliament is in recess]’ if he/she ‘considers that it is necessary to do so by reason of urgency’. An order made under s26 is made on the same basis and provides for certain of the same obligations as an order that could be made under the ETPIM Bill (see below). No temporary ETPIMs have yet been introduced under s26 (see for discussion eg HC Deb Vol 730, Col 1139, 5 October 2011, per Lord Hunt). In relation to Scotland, section 26(12) requires the Secretary of State to obtain the consent of the Scottish Ministers before making any provision in such an order that relates to or touches upon devolved matters in Scotland. The s26 provision, however, appeared to raise the question as to what

would occur if an emergency arose while Parliament was sitting, and the only available measures, aside from the criminal justice system, (or possibly the Civil Contingencies Act 2004, as amended) were TPIMs. Concerns as to the value of TPIMs in an emergency led to the introduction of enhanced TPIMs, in the ETPIMs Bill 2012 (Home Office 2011a) intended to allow the enhanced measures to be relied on if it was thought necessary as a crisis measure to constrain the activities of certain suspects more effectively than is possible under TPIMs. The design of the ETPIMs Bill, however, also indicated that some lessons, in human rights terms, had been learnt from the control orders saga. It provided for enhanced restrictions similar to those available via control orders, including forced relocation and longer periods of house arrest (ETPIM Bill Schedule 1, which does not specify a limit on the length of house detention), combined with the potential extension of the full controlled period (Clause 2(6)(c)), which states that a suspect subject to a TPIM could be transferred to an ETPIM without necessarily showing ‘new’ TRA, for another two years). However, it also accompanied them by the safeguard of raising the standard of proof (by ETPIM Bill clause 2(1) imposition of an ETPIM was based on a higher standard of proof (the civil standard) than for a TPIM prior to 2015 (Home Office 2016a)), and limited the period during which an ETPIM could subsist to two years.

The ETPIMs Bill received parliamentary scrutiny (see eg ETPIM Bill Joint Committee 2012, p26) and remains available to be brought forward at any time as emergency legislation in a crisis situation. The trigger that would allow it to be enacted is not indicated in the Bill (it can be introduced in response to ‘exceptional circumstances’ which ‘cannot be managed by any other means (ibid, para 3)), but it needs to be apparent, to an unspecified standard of proof, that the TPIM restrictions are not sufficient to deal with the risk that particular suspects had created (by Clause 2(4)(b) the Home Secretary would only be required to ‘reasonably considers it necessary’ to employ the more onerous restrictions). If the level of risk posed by suspects whose prison sentences were about to end, or whose TPIMs were about to expire, was deemed unacceptable, it was thought at the time that that could provide a rationale for introducing the ETPIMs Bill (ibid, Oral Questions taken before the committee, p6: ‘if you had...people who are assessed to be very dangerous, coming to the end of a two-year TPIM...that would be one such situation [in which the ETPIM Bill could be enacted’, per David Anderson).

But it is argued that the main lesson learnt from the interaction between the HRA and control orders manifested itself in the determination, apparent over the last six years, not to introduce

ETPIMs, even in the face of the terrorist attacks in the UK in 2017, the foiling of a number of terrorist plots in 2016-17, and numerous terrorist attacks in Europe in 2016 (see above). These attacks, especially the 2017 ones, have resulted in greatly increased security in the UK at certain locations and events (such as the Berlin Christmas Market truck attack on 16 December 2016, Ross et al 2016) but ETPIMs have not been introduced, and have not expressly featured in governmental responses to the attacks. The political will to deploy ETPIMs in response to ISIS-inspired attacks is not apparent. That may be due to a perception that further human rights-based litigation would arise, as it did in relation to control orders (some concerns as to their compatibility with the ECHR were expressed at the scrutiny stage: Home Office 2011b, para 22; Joint Committee on the Draft ETPIMs Bill 2012, paras 93, 95, 97). Its cost, combined with the adverse publicity thereby generated, as well as the possible counter-productive effects of relying on these measures, may mean that the Home Office takes the view that the security value of ETPIMs is not in proportion to their adverse effects. The current strengthened iteration of the TPIM scheme may also have made it less likely that a need to introduce ETPIMs is likely to be found to arise even in relation to high-risk returnees from Syria or the release of prisoners committed to ISIS in 2018 or 2019.

### **3.5 Conclusions**

It is concluded that the incremental interaction between human rights law and executive measures over the last seventeen years has influenced their various iterations post 9/11, and also the avoidance of implementing its most repressive iterations. Reliance on the *more* repressive versions of such measures that would clearly or possibly have necessitated a derogation has been accepted by Parliament, but not actioned post-2005, even though the terrorist threat is higher in 2018 than it was in 2005. Derogating control orders were ultimately never introduced and it seems unlikely at present that ETPIMs will be. Thus, executive measures on this model subsist only in the softened form of TPIMs, compliant with human rights law. But if TPIMs are being relied on only to a very minor extent, even in their current strengthened form, in the face of current estimates of the threat of terrorist attacks in the UK, the basis for retaining them must be questioned.

Clearly, much heavier-touch TPIMs might be introduced in future, allowing for periods of imprisonment or full house detention, necessitating a derogation to protect them. But leaving



aside the question whether a derogation to protect derogating TPIMs would be upheld by the Supreme Court, it is argued that the decisions of successive governments post-2005 not to seek a derogation or to maintain or introduce the most repressive measures on this model ('heavy-touch' or derogating control orders and ETPIMs) have demonstrated a serious engagement with human rights law, partly attributable to the impact of the Human Rights Act, which, despite concerns raised here as to stealthy recalibrations of rights, deserves recognition. That engagement, clearly apparent in the design of Part 2 CTSA, has represented a struggle to avoid an open declaration that human rights can no longer be adhered to, and the refusal to rely on those more repressive measures, combined with the restrained use of control orders/TPIMs is indicative of continued acceptance of ECHR standards in the courts and in Parliament. The courts' response to the repressive nature of the PTA under the HRA not only appeared to influence the Coalition's introduction of TPIMA, but also the fairly restrained design of strengthened TPIMs in 2015, indicating that further strengthening of TPIMs is improbable. Even if in future a more repressive iteration of measures on this model is introduced, the presence of ss3,4 and 6 HRA means not only that reliance on a derogation is less likely to be necessary, but also that attempting a concomitant down-grading recalibration of rights is unlikely to be successful. Future provisions governing a measure potentially requiring a derogation could be reinterpreted to ameliorate it to avoid overstepping the boundaries set by Article 5, bearing their fluidity as accepted at Strasbourg, in mind.

#### **4. Precursor offences**

Use of trial-based measures against terrorism, as opposed to reliance on executive measures such as TPIMs, tends to shore up the moral legitimacy of the use of state power (Drumbi 2007; Walker 2009). The increase in the range of preventive offences post 9/11 may provide one reason for the under-use of control orders, and now of TPIMs. Clearly, if a prosecution is successful, imprisonment is a more satisfactory means of preventing the participation of would-be terrorists in terrorist activity, for a time; Blackbourne and Walker have found that TPIMs 'continue to be enforced only to a meagre extent compared to criminalisation' (2016, p 842). The risk posed by ISIS or Al-Qaeda-sympathisers in the UK, including foreign fighters, or far-right extremists, has increasingly been addressed by placing reliance on the array of 'early intervention' or precursor terrorism offences, which was very significantly added to in 2006. Those offences were then strengthened from 2015 onwards by creating increased sentences, rather than new offences, as discussed below. Further increases in sentences have been



proposed in the Counter-Terrorism and Border Security Bill 2018-19 (Home Office 2018b), and the reach of existing precursor offences is to be clarified.

The display of support for ISIS or similar groups, whether by travelling to support the group, receiving weapons training abroad, aiding another in travelling (such as occurred in relation to Kristen Brekke, BBC 2016), or by sending money to relatives who are fighting with ISIS, or via soliciting support on social media, has been taken seriously, and resort to the criminal justice system, rather than to TPIMs, has been clearly evident.

#### **4.1 Intelligence-led policing in the UK**

Recently, more effective use of intelligence-led policing in the UK, including use of CCTV and of tracking of social media use as well as data sharing between European partners, appears to be enabling arrests of suspects at an early stage in planning strikes (Intelligence and Security Committee 2017 para 183). For example, on 15 April 2016 counter-terror police in the West Midlands arrested five people on suspicion of preparing terrorist acts following an investigation that involved Belgian and French authorities (Europol 2017 Annex 7). Max Hill QC, the independent reviewer of terrorism legislation, noted that in the year ending June 2017 ‘there has been a 257% increase in the use of [the Terrorism Acts] for arrests compared to the previous 12 months, [and] a 68% increase in overall arrests for terrorism related offences’ (Hill 2018, para 6.9). This exceptional increase in the number of arrests was primarily in connection with the number of the terrorist atrocities in 2017, including the Westminster Bridge attack in London (March 2017) and the Manchester bombing in May 2017.

There has also been an increase in the foiling of plots by suspect nationals, via effective use of intelligence, which, until 2017, succeeded in averting almost all terrorist attacks in the UK in the previous decade (there were only 2 jihadist terrorist-related deaths in the UK in the 10 years prior to 2017: the death in 2013 of Lee Rigby and of Mohammed Saleem in the West Midlands). 25 Islamist plots have been foiled since June 2013 (Home Office 2018, para 58; Hill 2018a, para 3.9) and the rate of detection has accelerated: since 2017, 16 plots have been foiled due to the effective use of intelligence (Home Office 2018, para 58). According to CONTEST, The United Kingdom’s Strategy for Countering Terrorism (Home Office 2016, para 2.6) in 2015 law enforcement and security and intelligence agencies disrupted six terrorist plots to attack Great Britain. The numbers of women and under-18s arrested for terrorism-related offences

both increased compared with the previous year. Of the 280 people arrested in 2015, 83 were charged with a terrorism-related offence, and 13 with other offences; 40 who were charged with terrorism-related offences have already been prosecuted; 38 of these have been convicted. The Home Office (2016b) found that there were 280 terrorism related arrests in Great Britain in 2015. The security services will be further assisted by new powers provided for under the Investigatory Powers Act 2016 which is partly in force; Part 7 provides for personal bulk-set data warrants where the ‘majority of the individuals are not, and are unlikely to become, of interest to the intelligence service in the exercise of its functions’ and ‘the intelligence service retains the set for the purpose of the exercise of its functions’ (in force from 25 July 2018)). Part 3 provides for authorisations for obtaining communications data, but is not yet in force.

#### **4.2 The array of early intervention offences**

A range of ‘early intervention’ or precursor offences are currently available. They are applicable to persons plotting terrorist acts, or inciting others to carry them out, or supporting others to do so. They have particular applicability to various suspects or groups, including those who have supported or fought with ISIS or similar groups abroad, or provided support from within the UK to those travelling or seeking to travel abroad to support such groups, or who have sought to mount ISIS-inspired attacks in Europe. Without rehearsing the full range of offences, they include in particular the offence of engaging in conduct in preparation for terrorism under section 5 Terrorism Act 2006 (TA 2006). Section 5(1) TA 2006 states that ‘A person commits an offence if with the intention of (a) committing acts of terrorism, or (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention.’ That is the most widely used offence and the one of most significance in terms of reaching a long way back into pre-action territory (Sentencing Council 2018; see also *R v Tarrik Hassane, Suheib Majeed, Nyall Hamlett and Nathan*, judgment of 22 April 2016 (unreported)). It is particularly broad since the conduct engaged in (the actus reus) can be of an innocent nature, taken in isolation, such as hiring a van. But the prosecution must prove an intention to engage in an act of terrorism (s5(1)). Section 5 is aimed at preparatory acts which could occur well in advance of a terrorist attack and was introduced as an alternative to (at the time) imposing a control order. It is of particular pertinence at the present time, given the use of ordinary objects, such as cars or vans or knives, to mount attacks in the last 4 years (Intelligence and Security Committee 2017, para 17; examples include the the London Bridge attack 3<sup>rd</sup> June 2017 and the Berlin Christmas market truck attack, 19<sup>th</sup> December 2017). The

Serious Crime Act 2015 section 81 provides for extra-territorial jurisdiction for this offence (s17(2)(b) TA 2006).

Some other quite widely used overlapping early intervention offences relating to encouraging the commission of terrorist acts are those arising under the Terrorism Act 2006 ss 1 and 2. Section 1(1) creates an offence allowing for – in one sense - particularly early intervention since it is aimed at preventing the instigation of terrorist acts. It could aid in preventing the tipping of an already-radicalised person into terrorist activity, or could interfere in the radicalization process, often via online instigation and propaganda. Section 1(1) prohibits the publishing of ‘a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences’. This very broad provision is qualified in a number of respects by s 1(2), providing that if a person publishes a statement within s 1(1) or causes another to publish such a statement on his behalf he commits the offence if ‘(b) at the time he does so, he intends the statement to be understood as mentioned in sub-section (1) or is reckless as to whether or not it is likely to be so understood’. Under s 1(3) the statements of *indirect* encouragement must be ones ‘(b)...from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances’. The offence can be committed abroad (s17(2)(a) TA 2007). This offence is particularly valuable at the present time due to the use of the internet, and social media in particular, to spread terrorist propaganda and groom recruits.

By section 2 Terrorism Act 2006, the dissemination of expression which encourages or assists the commission or preparation of acts of terrorism is also an offence. The actus reus of the offence relates to a ‘terrorist publication,’ which is something, such as a hard disk, that contains audio, audio-visual or visual material (under s2(13) “publication” means an article or record of any description that contains any of the following, or any combination of them: (a) matter to be read; (b) matter to be listened to; (c) matter to be looked at or watched), that ‘is likely to be understood’ by people encountering the material to be ‘a direct or indirect’ invitation to commit or prepare to commit acts of terrorism, or to assist the commission or preparation of such acts (s2(3) TA 2006)). The conduct relevant to terrorist publications is extremely broad, and includes: to distribute, give, send, lend, offer for sale or loan, provide a service enabling others to access, or possess such material with a view to performing the aforementioned activities

(s2(2) TA 2006). The mens rea is similar to that for the s1(1) offence above, but extends beyond intentional or reckless encouragement or inducement, to include assistance in the commission or preparation of acts of terrorism. In relation to requesting or encouraging others to kill on behalf of a terrorist organization s4 Offences against the Person Act 1861 (soliciting murder) would also be applicable.

There are a range of proscription-linked offences which play a similar role in respect of groups that are already proscribed. Under the Terrorism Act 2000 s 12(1) TA it is an offence to solicit support, other than money or other property, for a proscribed organization; under s 12(2) it is an offence to arrange a meeting (3 or more persons) which the organiser knows is to support a proscribed organisation, and under s 12(3) it is an offence to address a meeting to encourage support for such an organization. Under s 13 TA 2000 it is an offence to wear an item of clothing, or wear, carry or display an article, 'in such a way or in such circumstances as to arouse reasonable suspicion [that the person in question] is a member or supporter of a proscribed organisation'. It is notable that no specific intent to invite support is required, but rather awareness that support is being invited.

There are a range of offences relating to participating in or materially supporting preparation for terrorist activity beyond the s5 TA 2006 offence. Section 15 TA 2000 covers the offence of fund-raising to support terrorism, while s16 TA 2006 covers using or possessing money or other property for the purposes of terrorism. Under s16(2) a person commits an offence if he (a) possesses money or other property, and (b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism or encouraging terrorism. Section 6 TA 2006 covers training for terrorism, and s8 TA 2006 prohibits anyone from being at a place where weapons training is going on (whether in the UK or abroad). Section 58 TA 2000 covers the collection/possession of information useful to a person committing or preparing an act of terrorism ('A person commits an offence if (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind). It is a defence if there is a 'reasonable excuse for possession' of the material, such as for research s58(3). When the Counter-terrorism and Border Security Bill 2017/19 is enacted a range of other offences will become (under clause 8) in effect precursor terrorism offences if they have a 'terrorist connection', including possessing explosives with intent to endanger life, or cause

serious injury to property, contrary to s3(1)(b) of the Explosive Substances Act 1883, and possession of an explosive under suspicious circumstances, under s4.

In 2015-18 the government and Independent Terrorism Legislation Reviewer's view was that it was not necessary to broaden the range of precursor offences, by further exploration of pre-action territory, but rather to extend their impact by widening the territorial reach of these offences, and enhancing the severity of the penalties they attract (Hill 2018, chap 7; Home Office 2018). For example, the Policing and Crime Act 2017 ss68-69 make it a criminal offence for an individual released on pre-charge bail, following an arrest for a relevant terrorism offence, to breach any conditions of that bail that prohibit them from leaving the country. Another measure to enhance the management of terrorist offenders is provided by ss47–50 of the Counter-Terrorism Act 2008. If a suspect is convicted of one or more terrorist offences, then an order of the court made under these means that, as a convicted terrorist, he or she must notify police of their personal details, including home address, for 15 years after release. Further, a conviction for one or more terrorism offences would also provide the opportunity to place such persons on a deradicalisation programme, regardless of whether they are imprisoned or subject to other sanctions. Another measure is s81 Serious Crime Act 2015 (SCA) which amended s17 TA 2006 by adding the offences under ss5 and 6 to the list of extra-territorial offences, and Part I Criminal Justice and Courts Act 2015, which increased the maximum penalty on indictment for terrorism-related offences to life imprisonment for weapons training for terrorism (s54(6)(a) TA 2000) and general training for terrorism (s6 TA 2006). Furthermore, s3 Criminal Justice and Courts Act (CJCA) amended Part 1 of Schedule 15B to the Criminal Justice Act 2003 which lists a number of terrorism offences (including preparing acts of terrorism under s5 TA 2006) to be eligible for the new life sentence under s122 Legal Aid, Sentencing and Punishment of Offenders Act 2012, and Sched 1 para 2 CJCA amended the Criminal Justice Act 2003 to insert Chapter 5A to list a number of terrorism offences to attract enhanced sentences in s236A: 'Special custodial sentence for certain offenders of particular concern'. Section 6 and Sched 1 CJCA make provision intended to ensure that persons convicted of serious terrorism-related offences are not released early without any consideration of their risk. The new sentence is made up of a custodial term and a mandatory year of licence. The Counter-Terrorism and Border Security Bill 2018 cl 5 reflects the policy of continuing to extend the territorial application of counter-terrorism offences to include s2 TA 2006 (Dissemination of Terrorist Materials), s13 TA 2000 (uniform associated with a terrorist organization) and s4 of the Explosive Substances Act 1883.

### 4.3 Use of these offences in practice

There has been an increase in the last four years in arrests and convictions for precursor-type offences. According to one study of Islamic terrorism in the UK:

A total of 386 separate charges were successfully prosecuted [resulting] in 264 convictions between 1998 and 2015. The most common principal offences (the most serious based upon the maximum penalty for each offence) were preparation for acts of terrorism (27 per cent) and possession/collection of information useful for terrorism (14 per cent)' (Stuart 2017, p16).

Between 2014-2018 a number of these offences, in particular those relating to preparing acts of terrorism or distributing or possessing information relating to terrorism, were successfully charged in relation to planning or inciting acts of terrorism within the UK (see below). There was a significant increase in prosecutions for such offences in 2014-18 (Hill 2018, chap 7). There were a total of 69 arrests in the first half of 2014 for a range of offences committed by persons who had travelled to Syria or Iraq: fundraising for terrorist activity; the preparation and/or instigation of terrorism acts; travelling abroad for terrorist training. Overall, during 2014 more than 160 people from the UK were arrested for offences relating to travelling to Syria or assisting others to do so (Home Office 2015f). The use of precursor offences in relation to ISIS activity in Syria continued in 2014-16, but then began to give way to prosecutions for offences linked to perpetrating ISIS-inspired terrorist acts in the UK (Hill 2018, chap 7; Home Office 2018, para 59), although prosecutions were also increasingly linked to the activities of far-right groups. For example, five members of National Action were imprisoned in 2018 (Home Office 2018, para 62). In the years 2014-2016 18 individuals were sentenced under either ss1 or 2 TA 2006 (Sentencing Council 2018, table 1.1), and in 2016 ten individuals were sentenced in relation to offences under s2, as compared with three under s1 (Hill 2018, para 6.21). Also, in 2014-16 ten individuals were sentenced for offences relating to terrorist financing and nine individuals received sentences for offences under s58 TA 2000 (Hill 2018, para 6.21). Five individuals were sentenced for inviting support for ISIS under s12 TA in the same period (Sentencing Council 2018, table 1.1).

A few indicative examples of prosecutions for these offences may be given. A recent notable example of preparation for the commission of terrorist acts associated with ISIS was apparent in the case of Dich and Rizlaine Boular, a mother and daughter, who pleaded guilty to s5 TA

2006 (preparation of terrorist acts) after an MI5 operation revealed that they were plotting to carry out a knife attack (Gardham and Hamilton 2018). Dich had assisted Rizlaine to acquire a knife and Rizlaine was revealed to be practicing for the attack at the time of her arrest. Another example is that of Imran Khawaja; on return from Syria he was convicted in 2016 for preparation of terrorism, attending a terrorist training camp, and receiving weapons training (*R v Imran Mohammed Khawaja, Tahir Farooq Bhatti and Asim Ali* (CPS 2016; BBC 2016a)). An example of assisting others to commit terrorist acts related to ISIS is provided by the convictions of Kristen Brekke, Adeel Ulhaq and Forhad Rahman; they were accused of assisting a 17-year-old jihadi in travelling to Syria from the UK to join ISIS fighters. They were charged with the TA 2006 s5 offence and found guilty at the Old Bailey (*R v Forhad Rahman, Adeel Brekke and Kaleem Kristen Ulhaq* (CPS 2017)).

*R v Amjad (Adeel)* ([2016] EWCA Crim 1618) provides an example of use of a very early stage preparatory offence. In 2013 Amjad was found to possess books which set out an Islamic basis for violence against the West that are often associated with Islamist radicalisation, and also a notebook delineating a list of ‘fitness requirements for a Mujahaddin fighter’; he was charged with the offence under s58 TA (collection of information useful for terrorism). The defendant argued that he had a reasonable excuse (s58(3)) for the notebook, which was simply to improve his fitness. A key issue was that ‘Police internet searches [had] revealed a similar list of fitness requirements in a document *Crusaders War on Iraq* and in a Wikipedia reference to its author... as a terrorist’ ([4]). This was viewed as reinforcing the argument that possession of the notebook did not have an innocent purpose ([35]). A further example of prosecution for a terrorist offence at an early stage arose in respect of Arbias Thaqi from East London who was sentenced to 18 months’ imprisonment and a five-year criminal behaviour order (5 June 2018, at Stratford Youth Court) after pleading guilty to six counts of dissemination of terrorist material under s2 TA 2006, and two counts of possession of documents of a kind likely to be useful to a person committing or preparing an act of terrorism (s58 TA 2000). Two phones and a computer were seized from his address, and analysis of the devices found a large amount of terrorist-related material including chat logs, documents and videos. Detectives found that Thaqi had saved various Daesh propaganda ‘magazines’, as well as bomb-making manuals. They also discovered that Thaqi was sharing some of the terrorist-related files and documents with others through encrypted apps (Metropolitan Police 2016).



A number of high-profile ISIS supporters were successfully prosecuted in 2016 for incitement/encouragement offences. The most high-profile of these was the conviction of the former islam4UK leader Anjem Choudary, who was sentenced under s12 TA 2006 for his expressions of support for ISIS in a number of public talks posted to Youtube and in an oath of allegiance published online (s12(1)) (*R v Choudary (Anjem)* [2017] EWCA Crim 1606). Anjem Choudary was sentenced to 5 years and six months imprisonment in 2016. Another example of an individual with a high profile on social media, which she used to spread pro-ISIS propaganda, was Tareena Shakil, who left the UK to join ISIS fighters in Syria, and claimed that she had been groomed by members of ISIS and had escaped back to the UK (*R v Tareena Shakil* (CPS 2018; Morris 2016; Hill 2018)). She was sentenced to four years for her ISIS membership and two years for encouraging acts of terror in messages she sent via social media (under s 1 TA 2006). She was entitled to release on licence after the halfway point, as was Choudary who was released in 2018. Similarly, in *R v Zafreen Khadam* (CPS 2018; Hill 2018 p 64), a makeup artist known as the ‘Jihadi Princess’ (Whitehead 2016) who had cultivated a twitter persona and issued numerous tweets designed to encourage others, especially women, to join ISIS, was sentenced to 4 years and 6 months on conviction for 10 offences under s2 TA 2006.

#### **4.4 Proposed new precursor offences and further increases in sentences in the Counter-Terrorism and Border Security Bill 2018-19**

The Queen’s Speech after the 2017 General Election included the following: ‘In the light of the terrorist attacks in Manchester and London, my government’s counter-terrorism strategy will be reviewed to ensure that the police and security services have all the powers they need, and that the length of custodial sentences for terrorism-related offences are sufficient to keep the population safe’. In 2018 the Home Office put forward its new counter-terror strategy, which included adding to these precursor offences as part of a new Counter-terrorism and Border Security Bill 2018-19 (Home Office 2018; first reading 6 June 2018; as of November 2018 the Bill is at the Committee stage). The changes include altering the s12 TA 2006 (inviting support for a proscribed organisation) offence to extend it to making statements supporting a proscribed terrorist group while ‘being reckless as to whether others will be encouraged to support the organisation’. This could cover persons such as Anjem Choudary who had made such statements in the past, but had attempted to remain just outside the boundaries of the existing offences until he overstepped the line by expressing support for ISIS, as discussed



above. Prosecutors would not therefore have to prove that a suspect made a statement that he intended, or was aware, would *invite* support for a specific organization, which would make it more challenging for individuals to express general approval for organisations such as ISIS while avoiding prosecution. The new offence would be broader than the offence under s1 TA 2006 (encouragement of terrorism) so long as the group in question had been proscribed.

The Bill also seeks to modernise certain offences and increase the penalty for others. By clause 5 the Counter-terrorism and Border Security Bill 2018-19 would alter the s2 TA 2006 (terrorist publications) offence so that it could be charged when the conduct occurred outside the UK, a measure designed to facilitate successful prosecutions of individuals, such as those who had acted as ISIS proagandists while in Syria (HC Deb Vol 642 Col 638, 11 June 2018). By clause 6 of the Bill the maximum sentence for both ss1 and 2 TA 2006, as well as s58 TA 2000 (information useful for terrorism), would be raised to 15 years. An amendment to s13 TA 2000 set out in clause 2 would make it clear that displaying an item of clothing or other article (such as a flag) of a proscribed group by publishing images of them online would also be within the offence. The s13 offence as currently worded refers to display of an image in a “public place” rather than publication of digital images. Another proposed amendment appears in clause 3 of the Bill; it would amend the offence of collecting information (under s 58 TA) likely to be useful to a terrorist, to cover repeated viewing or streaming of material online. The amendment would make it clearer that it is an offence to view terrorist material online three or more times. It is not clear that so doing would satisfy the demands of s58 as currently conceived so the offence appears to create an extension of criminal liability in this context.

A further amendment to ss1 and 2 TA 2006 (encouragement to commit terrorist acts and terrorist publications) is set out in clause 4 of the 2018 Bill. The amended sections would not require a statement to be understood to encourage terrorism by members of the public to whom it is published, but rather that the statement must be understood by ‘a reasonable person’ to encourage the commission or preparation of terrorist acts. That would extend the offence so that encouragement of someone who does not understand that they are being incited, such as a child or vulnerable person, would be caught. (The amendment to ss1,2 TA 2006 may further enable the prosecution of individuals, such as Umar Haque, who seek to radicalise children. Umar used his position in two schools and during religious instruction in a Madrassa to influence over one hundred children to become a ‘Jihadist army’ by showing them violent ISIS-linked videos (Grierson 2018a).) Section 1 TA 2006 does not cover the latter situation since it

is necessary that members of the audience could ‘reasonably be expected to infer’ (s1(3)(b)) that the conduct being praised is conduct that they should emulate. Another notable provision of the Bill, absent from the 1<sup>st</sup> reading, is the ‘designated area’ offence (now cl 4). The new offence would prohibit travel to a designated area such as Syria. Clause 4 provides that it is a criminal offence for a person to enter, or remain in such an area, and the only defence arises if there is ‘a reasonable excuse for entering, or remaining in, the designated area’ (cl4(2)). In the second reading of the Bill, the Secretary of State indicated that the proposal may be added at a later stage, and that he was seeking further advice on the matter (HC Deb Vol 642 Col 637, 11 June 2018). This offence, originally suggested by the Independent Terrorism Reviewer in 2015 (Anderson 2015, para 8.21) had been adopted in Australia as a response to the problem of returning foreign fighters from Syria (section 119.2 of the Criminal Code Act 1995 (Australia)). The utility of this offence, and its use in Australia, was referred to at the Committee stage, leading to its ultimate inclusion (eg Vol 643, Col 10, 26 June 2018).

## **5. Conclusions**

This chapter has found that the current iteration of the control orders model, and the shift from an emphasis on reliance on measures on that model, to reliance instead on precursor offences, represents the culmination of an interplay between human rights, preventive measures and developments in security knowledge over the seventeen years since 9/11. TPIMs were intended to provide a more effective route to prosecution than control orders – hence the use of the term ‘investigation’ in their designation. But they have proved ineffective as an investigative tool (Anderson 2014, para 6.4; Fenwick 2015), so exploration of the value of precursor offences has occurred instead, and is still ongoing, as demonstrated by the 2018 proposals for their extension, which also made no mention of changes to TPIMs. It is clear that the charging of offences as opposed to relying on executive measures – even in their softened TPIMs form – is a preferred means of countering terrorist activity. It is likely to further both security and respect for rights in a way that executive measures tend to fail to do; it is also less likely to produce counter-productive effects. For example, in the UK, measures on the control orders model have been used exclusively against Muslim men, so they are capable of fuelling a grievance narrative based on the notion of ‘othering’ Muslims (Mahamdallie 2015). That may foster anti-Western propaganda, which at times has deliberately disregarded the paucity of the use of such measures (such as promulgated by the organisation CAGE which has consistently

campaigned against TPIMs highlighting their failure to lead to prosecutions, but not the restraint shown as to their usage: eg CAGE 2014).

The UN Security Council and the Council of Europe have consistently called on member states to address terrorism (eg Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No.217), with a special emphasis on terrorist activity linked to ISIS, in a comprehensive fashion, focusing on preventive measures, in order to protect citizens in general, while continuing to respect human rights norms. (Representatives of Belgium, Bosnia and Herzegovina, Estonia, France, Germany, Iceland, Italy, Latvia, Luxembourg, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, Turkey and the UK, as well as the EU, signed the Additional Protocol at a 22 October 2015 ceremony in Riga, Latvia. It focused on tackling the problem of ‘foreign terrorist fighters’ and covered intentionally participating in a terrorist group, receiving training for terrorism, travelling abroad for the purpose of terrorism, funding or organising such travel.) In particular, in January 2016, the United Nations Secretary-General presented to the General Assembly a Plan of Action to Prevent Violent Extremism (PVE; A/70/674, 24 December 2015), which adopted ‘a comprehensive approach to the challenge of violent extremism, encompassing not only ongoing and essential security-based counter-terrorism measures, but also systematic preventive measures that directly address the drivers of violent extremism at the local, national, regional and global levels’ (para 6; UN Security Council 2018). In 2018 the UN Security Council Terrorism Committee reiterated this determination, and emphasized that it included addressing the use of social media to incite terrorism, but that the comprehensive effort should seek to avoid counter-productivity of measures, and should foster ‘initiatives for counter-messaging and the use of social media and other communications channels to counter terrorist narratives and promote alternative visions based on respect for human rights and human dignity’ (ibid).

This chapter has sought to demonstrate that systematic preventive measures have been adopted in the UK. But it has also argued that some of the preventive measures most likely to create counter-productive effects – Part 4 ACTSA and control orders – have given way over the years since 9/11 to less repressive measures in the shape of TPIMs. But, more significantly, the impact of their role has been increasingly down-graded over the last ten years in favour of focusing on the development of precursor offences. This chapter has acknowledged that the Prevent strategy at the present time has shown a potential to create counter-productive effects,

but has argued that therefore efforts should be directed towards enhancing the transparency of its operation, and dispelling ‘Prevent myths’ rather than to abandoning the strategy.

This chapter has considered the roles of the courts, the executive and Parliament in designing and re-forging a range of preventive measures in the face of ECHR-based constraints and in the absence, after 2004, of a derogation from them. As discussed, increased acceptance is apparent in relation to this saga that the terrorist threat must be managed *within* the boundaries of human rights law, although the fluidity of such boundaries has also been exposed. The interplay considered here, and its current outcomes, between preventive security measures and human rights is illustrative, it is concluded, of the post-9/11 struggle in the UK and elsewhere to reconcile international human rights norms with reliance on such measures (Walker 2013; Bachman and Burt 2010). On this note David Anderson QC wrote in December 2016: ‘European human rights law does not so much hamper the fight against terrorism and extremism as underline the legitimacy of that fight’ (Anderson 2016, paras 11.11, 11.12).

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